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Contrasting France and Canada**

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ABSTRACT

The authors argue that the Young Offenders Act is a continuation of a trend which removes conflicts from the hands of the juveniles themselves and places them in the hands of the professionals. A basic assumption of the YOA is that juveniles will be responsible for their actions, will understand the law, and thereby appreciate the juvenile justice system. In fact the opposite may be taking place; as lawyers take over the conflicts it may defeat one of the major efforts of the new act.

Nils Christie has argued that conflict should be regarded as property which *belongs to* victims and offenders. Many of our modern legal systems take that conflict out of the hands of the people involved and place it in the hands of "experts." The general theme of this paper is that juveniles who are processed by the juvenile justice system in France have more control over those conflicts and remain more active participants than their North American counterparts. The dynamics of the French juvenile justice system will be described very briefly from the perspective of someone who takes for granted the assumptions of the North American juvenile justice system.

Introduction

In 1976 Nils Christie gave a lecture at the University of Sheffield and suggested that conflicts in society performed certain positive functions (1977). Conflicts are "property" and belong to the people involved. The participants in conflict may wish to see them resolved in ways that satisfy them, but sometimes those conflicts are taken away and become the property of courts, judges, lawyers, or social workers. Christie argues that conflicts make an important contribution to society. Highly industrialized societies do not have too much internal conflict, but rather they have too little. He feels that we must organize social systems so that conflicts are nurtured and made visible. In particular we must see to it that professionals do not monopolize the handling of conflicts. In our criminal justice systems the victims of crime have in particular lost their rights to participate in conflict resolution.

This paper will attempt to illustrate some of the themes suggested by Christie with specific situations in Canadian courts. In particular, we will focus on the juvenile justice system in France and in Canada, noting particularly those situations where conflicts have been taken out of the hands of the people involved, such as juveniles, and placed in the hands of professionals. The general theme of the paper is that juveniles in France are more inclined to be *active* participants in the conflict resolution process. By contrast, in Canada the

juvenile is much more likely to be a *passive* participant in conflicts and in their resolution. Social workers take over some areas of discretionary decision making. With the new Young Offenders Act there is the distinct possibility that lawyers will encroach even more in areas where juveniles were able to have some control over the conflict.

This paper is directed toward a Canadian audience. Thus, any implied criticisms concentrate on the Canadian rather than the French system. The goal is not to compare one system with the other in a qualitative sense. Rather, it is directed toward North American audiences with the hope that the criticisms will be constructive. Deficiencies in the French system are basically ignored, because the criticisms are simply not directed toward a French audience. While the co-authors may direct their attention to reforming the French juvenile justice system at a later time, this paper is concerned with the move toward a more legalistic juvenile justice system as characterized by the recent Young Offenders Act in Canada and the shift that has taken place in the states of New York, Washington, and other parts of the United States in recent years.

The Utility of Conflict

We have been taught that conflict is bad and that we need official bodies for conflict resolution to avoid private vengeance and vendettas. One forgets that

conflicts could *belong* to people and they might be used in an effective manner. Christie describes a situation in Tanzania, in a large house in a very small village. The house was overcrowded. The conflict was between a man and a woman. They had been engaged. He had invested a lot in the relationship over a long period of time, until she broke it off. Christie notes that the former lovers were the center of everyone's attention. They talked often and were eagerly listened to. Relatives and friends took part, but they did *not take over*. The three judges were extremely inactive. The real experts were the local people who knew the norms and what had happened.

By contrast juvenile courts typically have many people moving around who seem to know what they are doing, but the youth and his family are usually quiet and confused. The extent of that confusion is illustrated by a study in the Toronto court. This research focused on the expectations and perceptions juveniles and parents had of the system. They noted that a lawyer talked with every juvenile before the hearing and then sat next to the defendant in each juvenile case. However, when asked if they had a chance to talk to a lawyer, 12% of the juveniles said they had not (Wilks, Birnie, and Chamberlain, 1979). Not only does the juvenile lack control over the situation, he is not always sure who the actors are.

The courts are not central elements in the daily life of the juvenile or in the daily life of the people who are important to him. They are peripheral to that life in that they are located in administrative centres, usually in large buildings away from familiar settings. In the courtroom itself the actors who talk, argue, and make important decisions sometimes do so with only a portion of the effected parties being involved. Victims are frequently not there, the friends of the accused are usually not there, unless they are also charged with some offence. One parent may be in attendance, usually the mother. Neighbors, who may know the family and who might add useful insights, are rarely in the courtroom. The judge almost always asks the parent to comment on the case, but it is usually to learn whether or not the youth is obedient at home and if the parents have punished or are controlling the juvenile in some manner. Clearly, neither the youthful defendant, the parents, or victim is in charge of the operation. They do not control the conflict. Instead, the parties are *represented*. In fact the victim is so thoroughly represented by the state, in the form of the prosecutor, that he or she is usually completely out of the arena. The victim is, in actuality, a double loser. There is usually little opportunity to confront the defendant. Nor can the victim participate fully in what might have been an important ritual. The victim has lost his case to the state. Admittedly, we are seeing some steps in recent years designed to bring the victim back into the process to some degree.

The point that Christie makes is that the courts are not central in the lives of citizens. Instead, they are peripheral in that the activities are taken out of the hands of those who are most concerned by professionals. An excellent illustration of this process is the administration of justice in Northern Canada.

Losing Out to the Professionals

Whether one uses a circuit court to bring the justice system to small communities in Northern Canada or transport people to an administrative center, such as Yellowknife, the resolution of conflict has been taken out of the hands of local Inuit or Indian communities. Although some attempt has been made to adjust some of our legal procedures to the North, the law and the system is imported from the South and is not necessarily understood nor appreciated by the native peoples. While many people recognize that a foreign system has been forcibly imposed on another culture, and thereby helps to erode that culture, Christie would probably argue that the conflicts have been taken out of the hands of the persons most affected. Instead, a judge, clerk, prosecutor, and other professionals fly into the community, take possession of the conflicts, decide on how they are to be resolved, and fly out again. There is little evidence that these conflict resolutions, imposed by outsiders, are more effective than measures which might have been chosen by the indigenous community.

Many well meaning people feel that bringing the rule of law to the North was a desirable thing, just as the British were convinced that their rule in India was beneficent. If one views the collapse of indigenous cultures as inevitable, and hastening that process as desirable, such logic may make sense. Richard Ericson argues, however, that law seems to be used more when inequality is the greatest, when there are more pervasive relationships of domination and dependency (1983).

(It) is important to recognize that both the police themselves and the law in general are exotic phenomena, not seen in most societies across human history. . . . They are found only where the conditions are right – where there is a substantial degree of inequality among the population, for example, where many relationships are distant and impersonal, where lifestyles struggle for dominance, where unemployment, homelessness, and isolation are widespread, and where people have few alternatives by which to handle their conflicts. The police and law therefore flourish in modern society, since it has these conditions in abundance (Black, 1980).

We might also argue that stealing conflicts is more likely in societies that display inequality. Law itself, which is ideally supposed to be the basis of equality before the law, is an elaboration of when and against whom it is justifiable to discriminate (Ericson, 1983: p. 9). When law becomes the domain

of experts, instead of being part of the common heritage of everyone in the society, it is more difficult for the common citizen to maintain possession of his conflict.

Contrasting French and Canadian Juvenile Justice.

Although the "stealing of conflicts" is not as blatant in France and Canada as it is in the Canadian North, the process is similar in juvenile justice systems. We suggest that there are differences in degree and that Canada takes conflicts away from participants more than French juvenile courts. Part of the difference may be in the central role played by the juvenile court judge in France compared to the practice in Canada of having judges remain at some distance from the cases. In France, the police have only 24 hours to make a decision regarding a juvenile. This can be extended to 48 hours for drug cases. After that, the case is passed on to the prosecutor. At this stage in the proceedings, the prosecutor may decide to simply record the incident and not proceed further. Another option is to send the case to the juvenile court judge who has the power to detain the juvenile in closed facilities or release the juvenile to his parents. Few juveniles are detained. It is more typical for the judge to interview the juvenile in his office, usually with his parents.

This procedure differs significantly from Canadian courts. In Canada, the police may screen out the case, but if they decide to lay a charge, and the

prosecutor concurs, there will be a formal court hearing. In France, the first hearing with the judge could be a preliminary step to be followed by a formal courtroom appearance, but in the vast majority of cases, if the offense is not particularly serious, the matter will be resolved in the judge's office. Theoretically, the judge has considerable power. He can place a juvenile under the supervision of an *educateur*. While the word *educateur* is not quite the English equivalent of a probation officer or a correctional social worker, it is probably fairly close. The essential difference between the decisions that are made in the office versus the courtroom is that the French judge cannot take away the juvenile's liberty without going to the formal courtroom appearance where the judge sits with two lay judges. In the courtroom the prosecutor presents formal charges, and the juvenile *must* have a defense attorney. In other words, most of the work of the French judge is handled in the informal setting of his office where he has considerable flexibility and, theoretically, much power. In fact, he relies heavily on persuasion and the cooperation of the juvenile. In this type of situation, does the juvenile retain more control over the conflict than in the Canadian system?

We would argue that the type of interaction which takes place in the judge's office in France differs considerably from anything that exists on the Canadian scene, except perhaps in small communities. The French judge is responsible for a certain geographical area which might have a population of

150,000 to 200,000 people, and would probably be familiar with people and institutions in that area to a greater degree than Canadian judges sitting in metropolitan centres. The French judge is *the* judge for the area. Although there may be substitutions for vacations or other absences, there is considerable recognition that a juvenile has a right to see "his" judge, the person who is most familiar with his case. This familiarity with the background of the juvenile is crucial. The judge is probably the most knowledgeable person when it comes to the juvenile. Since the judge is making efforts to use procedures that do not involve imprisonment, the process involves a considerable degree of negotiation. The juvenile is expected to respond, explain past actions, give reasons, and enter into the discussion as to what should be done next. The conflict and its resolution is still being influenced by the juvenile.

By contrast, the initial court appearance in Canada, is relatively brief. If it is a first appearance, the juvenile and judge are strangers to one another. The judge is required to be completely uninformed about the juvenile and the situation. Knowledge is contamination. Ignorance supposedly guarantees justice. Usually there is a guilty plea and, after a few minutes of inquiry, the judge usually decides on a relatively minor disposition, such as probation, community service, or a fine. Usually the interaction is short, with the juvenile contributing very little to the process.

Since the introduction of the Young Offenders Act this ritual may eliminate meaningful participation of juveniles even more. Initial appearances in the Youth Court since 1985 resemble adult court more and more. Instead of a small courtroom involving only those concerned with one case, there is now a tendency to use large courtrooms where many cases are heard in sequence. For cases involving minor delinquencies, there is some time pressure. Although judges may ask youths to comment, there may be less prompting than in the past. Young people and their parents may correctly read the situation, knowing that the judge needs to move on to more serious cases. If one keeps quite, only a minor penalty is likely. The possibility of discussing some underlying problems, with the hope of getting help from the judge, is submerged. Parents and youths may hesitate to interrupt the smooth and rapid workings of the system. In recent years, the duty counsel has been an aid to expediting guilty pleas, but in doing so he may take over the conflict and push the juvenile and the parents to one side.

If the case is more serious, or if the judge feels more information is needed, he can adjourn the case and ask for a presentence report. However, for most cases in juvenile court the process is perfunctory.

Letting juveniles speak for themselves. Another difference between Canada under the Young Offenders Act and France is the way we interview juveniles. Today we are very concerned if police interrogate juveniles without the

presence of a parent or some other responsible adult. Similarly, we do not wish the juvenile to appear before a policeman, judge, or anyone else without a parent or some other protector at his side. In other words, we feel that it would be terrible for the juvenile to have to speak all by himself. He cannot deal with the conflict himself, but must be represented by others who may take over the conflict. It is possible, however, that the parents are also parties in the overall conflict, not only on behalf of the juvenile, but against him.

In his office, the French judge may speak to the juvenile and his parents at the same time, but it is quite common for the judge to speak to juvenile and parents separately. The story is not always the same. From time to time a judge makes arrangements for a juvenile to stay in a group home because the juvenile wants to be free from his parents for awhile. Some of the appeals in French juvenile justice involve a judge agreeing with the juvenile on some sort of living arrangements with the parents being opposed. The appeal sometimes puts the parents on one side and the judge and the juvenile on the other. The point is that the juvenile has more input into the situation, has more say on how the conflict should be resolved. Sometimes the judge will become a powerful ally supporting the juvenile's definition of the problem and the way it should be resolved.

One should not exaggerate the degree to which the juvenile is in control of the situation in France. The judge and *educateur* can take the conflicts away

from the juvenile. But the juveniles soon learn that as long as they do not commit actual crimes, decisions regarding placement in a group home or meeting with a counsellor are somewhat negotiable. They learn that the *educateur* will not ask the judge to put a juvenile in jail if the juvenile fails to live up to the terms of an agreement. If the juvenile has agreed to stay in a group home and then leaves without permission, this is not a crime. It is an annoyance, an inconvenience, and the judge will want an explanation, but these are not grounds for imprisonment.

By contrast, in Canada, a juvenile who leaves a group home, or breaks various conditions of probation, can be picked up by the police, detained, returned to court, and locked up in more secure facilities. *Failure to obey the rules* established by the professionals becomes a crime in Canada. Parents can be punished for harboring their runaway children. Juveniles are punished, for their own good of course, when they do not comply with the demands of the system.

This leads to a different type of relationship between juvenile and judge in Canada compared to France. If a juvenile leaves a group home in France, it is not fleeing. The police will not pursue him. In fact, he may appear at the courthouse in order to speak to "his" judge. Usually, the juvenile will be able to present his side of the argument to the judge. As long as the juvenile has not committed a new crime, the judge may scold, but he is primarily the person who

can provide alternative solutions, and the judge soon learns that it is better to find a solution that has the support of the juvenile.

If a new crime is committed, or if the original case was serious enough to go to the courtroom, the French juvenile still plays a much more active role in the conflict than his Canadian counterpart. In a trial, the Canadian juvenile may say almost nothing, if he does not actually testify. In France the French judge *begins* the process by reviewing all the past delinquencies and asking the juvenile to respond to the many opportunities he has had in the past. To the French juvenile, the Canadian scene is a bit stupid. Facing a judge who is ignorant of the juvenile's past, how can he possibly understand the present situation? The French juvenile wants a judge who can appreciate his past experiences. After these preliminaries are past in the French courtroom, one gets down to the charges. Again, the juvenile cannot remain silent. Unlike the aloof Canadian judge, this judge is inquisitorial, and frequently disgusted because he has tried so hard in the past to help the juvenile. The juvenile is obligated to explain, not only his present act, but why he has been so unappreciative of these past efforts on the part of judges and social workers to help.

During this trial the defense attorney sits quietly. The juvenile has been on his own. He may shrug his shoulders and try to avoid responding, but the defense attorney will not take over the conflict. That is not his job. Parents and

others are involved. Victims who have been damaged can also make claims against the defendant, financial claims for physical or even psychological damage. Although the French judge may not use the courtroom very frequently, once used, the procedure is usually more prolonged than the Canadian trial. Relatives, neighbors, victims and others are more likely to provide input. They not only present their views but they have a dialogue with the judge, who has been actively involved with the family in the past. Finally, toward the end of the trial, the defense attorney makes a plea on behalf of the juvenile. Although the defense attorney can do other things, such as cross-examine witnesses, he cannot *replace* the juvenile or replace his presentation of his side of the conflict.

Professional Thieves

Since conflicts are property, Christie warns us of the professionals who tend to steal them, namely lawyers. They are *trained* to steal them--and resolve them. However, they may resolve them in ways that are not always satisfactory to any of the participants involved. The lawyers tell us the arguments we wish to use against our neighbor are without legal relevance and that we should not use them in court. Instead they pick arguments that we find irrelevant or even wrong.

Christie describes a case that took place just after WWII. The lawyer boasted how he had rescued a poor client. The defendant had been accused of

being a master-mind behind the Nazis in Norway. The lawyer saved him, however, by pointing out to the jury how lacking in ability, how deficient his client was, socially and organizationally. He could not have been one of the collaborators; he was without talent. And he won the case. The lawyer ended his story, with some indignation, that neither the accused nor his wife had ever thanked him. They had not even talked to him afterwards.

When others take over our conflicts they may see a solution in a way that does not satisfy us or any of those closely involved in the situation. Do lawyers and other professionals in juvenile court "explain" the delinquency of the defendant as the product of inadequate parenting? Do they humiliate the parents in courtroom? Does the judge add to the humiliation by placing the juvenile in an institution, not because he intends to punish the juvenile for wrongdoings, but because the family is so inferior, so inept? Such families are frequently excluded from the conflict resolution process.

The welfare oriented court of the past few decades may have stolen conflicts and humiliated families with resolutions imposed by social workers. If lawyers take the conflicts away from the social workers, will they humiliate these families less? When parents come to court wanting to plead guilty, wanting to get it over with, the father or mother in trouble at work for taking the day off, will the lawyer acting as duty counsel recognize *their* needs? Compared to social

workers, will lawyers empathize with families more, communicate with them more clearly? Or will their legalistic training lead to poorer communication and greater humiliation?

There is some evidence that juveniles do not understand many of the legal terms which judges, prosecutors, defense lawyers, and probation officers feel are important to be understood (Smith, 1985). Furthermore, some of the legally trained key actors in the system suggest that it may not be critical for the juveniles to understand legal terminology. Clearly such an attitude is incompatible with the intention of the Young Offenders Act which argues that juveniles should understand the process.

The shift from the welfare to legalistic court. In the past the conflicts may have been stolen by the "healers." Treatment personnel may have converted cases of conflict to one of non-conflict. After all, there was only one goal under the earlier Juvenile Delinquents Act, healing the sick. A broad range of professionals offered causes of delinquency, such as devils in the mind of the juvenile that had to be exorcised; biological, genetic, and social influences that needed correcting. The juvenile may not have recognized these causes. He may have viewed the problems differently, but he learned to acquiesce, to leave the conflict resolution to those who were accustomed to handling them. Under the Young Offenders Act, youth who formerly surrendered their conflicts to the

healers may now be surrendering them to the lawyers.

More sociologically oriented social workers reject the medical model, blame society, and emphasize class conflicts. These factors may all be important and may actually represent reality, but by stressing them we may also take the conflict away from the directly involved parties. The juvenile may prefer *not* to define himself as a member of an underprivileged group. He may not want to use racial prejudice as a factor which influenced his life. The political action necessary to change the plight of his group may not be of great relevance to a youngster standing before the judge. We are not suggesting that the juvenile sees the world clearly or defines the conflict correctly, but *his* definition of the conflict may be the one that concerns him the most.

In the past, North American juvenile justice may have stolen the conflicts involving juveniles by placing the resolution process in the hands of certain welfare professionals. Under the Young Offenders Act, the idea was to make young people more responsible. Is it possible we are simply transferring the resolution of some of the conflicts from social workers to lawyers? Is it not possible that the juveniles themselves, along with family, victims, and neighbors, might work out ways of resolving conflicts, possibly with the invited help of some professionals, that would be more effective than our current procedures?

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